

J U D G M E N T No 13

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In a closed session of 27 July 2018 the Constitutional Court in a panel composed of: Boris Velchev – Chairperson, and Members: Tsanka Tsankova, Stefka Stoeva, Rumen Nenkov, Keti Markova, Georgi Angelov, Anastas Anastasov, Grozdan Iliev, Mariana Karagyozeva-Finkova, Konstantin Penchev, Filip Dimitrov, and Tanya Raykovska, with the participation of Clerk Gergana Ivanova, examined Constitutional Case No 3/2018, as reported by Judge Anastas Anastasov.

The proceedings are under the first alternative of Article 149(1)(4) of the Constitution of the Republic of Bulgaria (the Constitution).

The case was initiated on 8 February 2018 at the initiative of 75 members of the 44th National Assembly. The Constitutional Court was asked for a ruling on the conformity of an international treaty signed by the Republic of Bulgaria on 21 April 2016 — the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Convention), done on 11 May 2011 at Istanbul — with the Constitution prior to the ratification of this treaty.

The Members of Parliament point out ‘the social and societal relevance of the Convention, the significant public interest and the high degree of political commitment of the society’ which motivated them to refer the matter to the Constitutional Court. The petitioners state that the National Assembly has received and continues to receive both positive and negative opinions on the Convention. According to the Members of Parliament, the negative opinions maintain that this international treaty introduces concepts that are incompatible with Bulgarian public policy and unknown in our national legal system and that the meaning contained in the provisions of the Convention is different from what is generally accepted and commonly used. According to the petitioners, the main arguments for non-conformity with the Constitution in most of the negative opinions expressed relate to the provisions of Article 3(c), Article 12(1) and Article 14(1) of the Convention and the terms used therein: ‘... “socially constructed roles”, “stereotyped roles”, as well as the term “gender” as objective elements of the meaning of the concept of “gender” ...’, in the sense of whether they are in conformity with the Constitution, including the provision of Article 46(1) of the Basic Law in the context of defining a ‘third gender’ and opening the possibility for same-sex marriages.

The petitioners also state that comparing the terms and phrases used in the Convention with the meaning of the constitutional provisions and the substantively assessing the conformity of the purposes, contents and nature of the Convention with the Constitution falls within the competence of the Constitutional Court, so it is for the latter to rule whether and to what extent fulfilling the obligations of the Republic of Bulgaria arising out of the Convention is compatible with the country’s Constitution.

By its ruling of 20 March 2018, the court allowed the motion for substantive examination and joined the interested institutions to the case; it invited non-governmental organisations and prominent scientists and practitioners and gave them the opportunity to submit written statements and legal opinions.

Of the joined institutions, the President of the Republic of Bulgaria, the Minister of Foreign Affairs, the Minister of Justice, the Minister of Health and the State Agency for Child Protection have submitted statements.

The statement of the President of the Republic of Bulgaria expresses the view that the Convention contains concepts and phrases with ambiguous meaning, thus giving grounds for different and conflicting interpretations, allowing for 'additional' meanings to be attributed to these concepts and phrases outside their known and well-established meaning, but above all — outside the core values enshrined in the Bulgarian Constitution. According to the President, assigning the social attributes used in the Convention to the term 'gender' is not in conformity with the clear understanding (as contained in the Constitution) of the equality between men and women, of identifying the person as a man or a woman (Article 6(2) of the Constitution), of the voluntary union (in matrimony or otherwise) between a man and a woman, of the family entrusted with raising and upbringing of children, of the special protection provided by the State to mothers (Article 46 and Article 47(2) of the Constitution).

The Minister of Foreign Affairs believes that 'the concepts, norms and regime of the Convention conform fully to the constitutional principles, norms and traditions'. She gives an overview of the current Bulgarian legislation and of the existing international legal commitments and concludes that the terms 'gender', 'socially constructed roles' and 'stereotyped roles', which have been borrowed from sociology, are new neither to the international legal doctrine nor to the domestic law of the Republic of Bulgaria. The Minister points out that, in the context of the Convention, the term 'gender', based on the two sexes, male and female, takes into account the existence of socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men. She also points out that the Explanatory Report to the Convention explicitly states that the term 'gender' is not intended as replacement for the terms 'women' and 'men', and that the Convention also uses the term 'sex', which shows that the terms 'gender' and 'sex' have independent meanings. With regard to the obligations that will arise for the Republic of Bulgaria after the ratification of the Convention following its entry into force, the statement maintains that they are entirely related to specifying the measures for preventing and combating violence against women and domestic violence in the context of implementing gender equality.

In her statement the Minister of Justice states that the Convention conforms fully to the Constitution and puts first the obligation to prevent and combat violence against women within the wider framework of achieving equality between women and men.

In his statement on the case the Minister of Health does not take a specific position. On the one hand, he believes that no problems may arise with regard to the understanding of the term 'gender' and with regard to the implementation of the provisions of Article 3(c), Article 12(1) and Article 14(1) of the Convention highlighted by the petitioners, since the main indicator for defining the protection provided by the Convention is the sex, and none other than the only possible female and male sexes corresponding to their biological definition, as perceived by the Constitution, the Bulgarian legal order and Bulgarian case-law. On the other hand, according to the Minister there could be an issue with the implementation of Article 3(b), Article 4(3) and Article 12(3), where there is a deviation from the principle of two biological sexes — male and female. The Minister assumes that because of the meaning thus attributed to those and to other provisions of the Convention, as well as because of the lack of clarity as to the categories used in these provisions, there is reason to raise the question of whether and to what extent the fulfilment

of the obligations of the Republic of Bulgaria arising out of the Convention would be compatible with certain parts of the Constitution.

In its statement the State Agency for Child Protection states that the framework nature of the Convention should be taken into account when assessing its conformity with the Constitution, and that it would be wrong to use for the purposes of this assessment only the Bulgarian translation, which is inaccurate in a number of points, including in the definitions of basic terms. The Agency supports the need to ratify the Convention and its conformity with the Constitution.

In pursuance of the given opportunity, the following non-governmental organisations also submitted statements on the case: Bulgarian Lawyers for Human Rights Foundation, Animus Association Foundation, Alliance for Protection against Gender-Based Violence Association, Bulgarian Fund for Women Foundation and the Institute of Modern Politics.

The Bulgarian Lawyers for Human Rights Foundation supports the statement that the Convention is in conformity with the provisions and the spirit of the Constitution, as well as of the current legislation on protection against domestic violence in Bulgaria.

The Animus Association Foundation finds that the Convention is in conformity with the Constitution and does not impose anything different from the meaning of 'sex' used in the Bulgarian Constitution, the Gender Equality Act or the Protection against Discrimination Act.

The Alliance for Protection against Gender-Based Violence Association supports the statement that the provisions of the Convention conform to the Constitution, that they do not contain concepts that are unknown in our legal system, different from the generally accepted and commonly used ones and incompatible with the Bulgarian public order, and that the fulfilment of the obligations of the Republic of Bulgaria arising out of the Convention is compatible with the Constitution.

The Bulgarian Fund for Women Foundation takes the firm position that the Convention conforms to the Constitution and that although it requires amendments to the Bulgarian legislation in a number of areas, it does not imply any amendments to the Basic Law. It states that the term used in Article 3(c) of the Convention has been mistranslated simply as 'sex', but in fact the definition refers to a term that denotes the social rather than the biological dimensions of the sex and in no way affects the predetermined biological sex. This mistranslation has led to confusion in the translation of other key terms such as 'gender-based violence against women' in Article 3(d), 'gender identity' in Article 4(3), 'non-stereotyped gender roles' in Article 14(1) of the Convention.

The Institute of Modern Politics considers that the Convention does not conform to the Constitution for the following reasons: Article 3(c) and Article 4(3) of the Convention violate the principle of legal certainty, which is a constituent element of the rule of law, because they contain terms and phrases the meaning of which is not clear, precise and unambiguous, thus creating unpredictability of the legal implications and the legal system; Article 12 and Article 14 of the Convention are not in conformity with Article 32(1), Article 47(1) and Article 47(2) of the Constitution, nor with the dignity of the individual as a fundamental constitutional value proclaimed in the Preamble of the Constitution; the philosophy of the Convention is not in conformity with the principle of equality and equal treatment of women and men, in so far as it focuses not on the unlawful social phenomenon itself — violence against the intimate partner and

domestic violence — but rather on the idea that ‘women, as a rule, are victims, and men, as a rule, are abusers’.

Written legal opinions have been given by Prof. Pencho Penev, Prof. Plamen Kirov and Prof. Daniel Valchev.

Prof. Pencho Penev argues that the Convention is not in conformity with the legal system established by the Constitution of the Republic of Bulgaria. According to him, when it comes to ‘gender’, the Bulgarian Constitution perceives it as its biological attribute – gender is biologically determined and the human individual is a man or a woman. According to Prof. Penev, the perception of another nature, another attribute of the term ‘gender’ will lead to unacceptable contradictions, as there will be two parallel and mutually incompatible concepts of the same term, one of which is different from the constitutionally established one. Prof. Penev also claims that Article 14 of the Convention does not conform to Article 47(1) of the Constitution. He maintains that the Convention adopts an educational approach involving the state ‘at all levels of education’, and calls for active involvement of other educational structures, as well as of non-governmental organisations and the media, which is in contradiction with Article 47(1) of the Constitution, which entrusts the upbringing to the parents and not to the State or to the non-governmental sector.

Prof. Plamen Kirov maintains that the Convention, in some of its parts, does not conform to the constitutional principles and norms of the Bulgarian Basic Law and is in sharp conflict with the Bulgarian constitutional identity. According to Prof. Kirov, Article 3(c) and Article 4(3) of the Convention are not in compliance with the rule of law, in so far as their possible entry into force in the Republic of Bulgaria would create legal uncertainty and conflict with the Bulgarian constitutional identity as they contain terms (‘gender’, ‘gender identity’) which are foreign to the Bulgarian constitutional and legal system, do not have a clear, precise and generally accepted legal meaning, and would create implications harmful to our legal system. Prof. Kirov also states that Article 12 and Article 14 of the Convention ‘contrast’ with the content of Article 32(1), Article 47(1) and Article 47(2) of the Constitution as they cause unacceptable interference with the private life of the citizens by obliging the Bulgarian State to take measures for changing the social and cultural patterns of behaviour of the Bulgarian citizens in order to eradicate ‘stereotyped roles for men and women’, without the latter being in any way connected with acts of violence, discriminatory behaviour or any other unlawful acts. At the same time this would involve gross interference of the State in the upbringing of the children in violation of the rights and responsibilities of the parents enshrined in the Basic Law.

Prof. Daniel Valchev believes that the provisions of Article 3(c) and Article 4(3) of the Convention do not conform the rule of law proclaimed in the Preamble and in Article 4 of the Constitution. According to Prof. Valchev, the ratification of the Convention would result in the adoption in the Bulgarian legal system of an instrument that contains terms with ambiguous meaning, proportion and volume, which contradict with terms that are already established in the legislation and the case-law. He also states that this can also lead to provisional granting of additional rights and additional protection to individuals who have been selected not according to objective criteria but based on their claims about their own internal emotions. In view of this, he believes that Article 1, Article 2 and Article 3 of the Convention do not conform to the principle of equality proclaimed in Article 6 of the Constitution. Prof. Valchev also asserts non-conformity of the provisions of Article 12(1) and Article 14(1) of the Convention with the provision of Article 47(2) of the Constitution.

The Constitutional Court finds it appropriate, first of all, to address some of the key points of the creation process of the Convention and its essential characteristics as an international legal instrument for combating violence against women and domestic violence, which are relevant to the further reasoning for the substantive ruling on the motion.

Under the Convention, the authentic text of the treaty is in English and in French, both texts being equally authentic. The assessment of the Constitutional Court, in the proceedings under the first alternative of Article 149(1)(4) of the Constitution, of the conformity of the international treaty with the Constitution prior to its ratification should be made on the basis of the Bulgarian translation of the text of the Convention presented in the case by the Council of Ministers of the Republic of Bulgaria. Parliamentary debates will be held on the Bulgarian version of this text upon submission of a bill for ratification to the National Assembly, this text will be promulgated in the State Gazette after the possible ratification of the Convention and on its grounds the obligations of the Republic of Bulgaria, arising out of the international treaty, will be carried out on the part of the State (Ruling of 23 October 1997 under Constitutional Case No 15/1997).

Combating violence against women is an issue of fundamental importance for Europe and is part of the underlying European values. Since the 1990s, the Council of Europe, in particular its Steering Committee for Equality between Women and Men (CDEG), has undertaken a series of initiatives to promote the protection of women against violence. The first comprehensive strategy for the prevention of violence against women was Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence adopted in 2002. The Parliamentary Assembly of the Council of Europe (PACE) has taken a firm political stance against all forms of violence against women by adopting a number of resolutions and recommendations on the various forms of violence against women. In 2008, the Committee of Ministers of the Council of Europe set up the Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence (CAHVIO) mandated to prepare legally binding standards which cover these two fields — violence against women and domestic violence. In 2011, the efforts of the Council of Europe ended with a draft convention prepared by CAHVIO to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence (Article 1(1)(a) of the Convention).

The Council of Europe Convention on preventing and combating violence against women and domestic violence is the first comprehensive international treaty aimed at setting standards on the grounds of which the countries can harmonise their domestic legislation in this field. The Convention explicitly defines violence against women as a violation of human rights and a form of discrimination against women. It includes specific provisions aimed at promoting gender equality and the status of women in society. These legally binding obligations (Article 4, Article 6, Article 12, Article 14) are expected to give new impetus to achieving equality between women and men at national level and to reinforce a common objective of non-discrimination against women. The Convention expands the grounds of non-discrimination and takes an approach of gender-based understanding of violence against women and domestic violence.

In parallel with the policy of the Council of Europe on protecting women against gender-based violence and non-discrimination against women, the Council of Europe, in a number of its acts, calls on the member states of the Council of Europe to explicitly prohibit discrimination based on 'gender identity' in national non-discrimination legislation and to include the human rights situation of 'transgender people' in the

mandate of national human rights institutions, with an explicit reference to 'gender identity' as a form of discrimination against women.

In 2010, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity. Under the Recommendation, the member states of the Council of Europe should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way. Member states should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognised, the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed. The measures address a number of key issues for the rights of lesbian, gay, bisexual and transgender persons (LGBT).

In 2014, the Council of Europe set up a structure dedicated to issues of sexual orientation and gender identity. In addition, the Secretariat of the Council of Europe also set up a Working Party on Sexual Orientation and Gender Identity, also incorporated in 2014. The structure assists member states in implementing the LGBT Recommendations of the Committee of Ministers.

In April 2015, the Parliamentary Assembly of the Council of Europe adopted a resolution against the discrimination against 'transgender' people in Europe (Resolution 2048 (2015), Discrimination against transgender people in Europe). The Resolution and the related report address the various forms of discrimination, including difficulties in gaining access to work, housing and health services. The Resolution also emphasises that the Assembly is concerned about the violations of fundamental rights, notably the right to private life and to physical integrity, faced by transgender people when applying for legal gender recognition and about the inadmissibility of the required preconditions such as sterilisation, divorce, a diagnosis of mental illness, surgical interventions and other medical treatments. The member states of the Council of Europe are called on to explicitly prohibit discrimination based on 'gender identity' in national non-discrimination legislation and include the human rights situation of 'transgender' people in the mandate of national human rights institutions, with an explicit reference to gender identity, as well as to develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex on the documents of transgender people, to make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record, and to consider including a third gender option in identity documents for those who seek it.

In 2015, the Council of Europe published a guide to legal gender recognition and protecting human rights of transgender persons, which defines 'gender identity' as: 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including a personal sense of one's body and other expressions of gender, including dress, speech and mannerisms'.

The foregoing clearly shows the link between the policy of Council of Europe on preventing and combating violence against women as a form of gender-based discrimination against women and the protection of certain rights of 'transgender' persons.

The Constitutional Court of the Republic of Bulgaria assessed the arguments in the motion of the Members of Parliament, in the statements of the institutions and the non-governmental organisations, in the submitted written legal opinions and the written evidence accepted in the case. In order to rule on the conformity of the Convention with the Constitution, the Court, having discussed the objectives of the Convention, the general and ad hoc principles, definitions and policies adopted therein, and the provisions of the Convention in their relation and correlation, established the following:

The Council of Europe Convention on preventing and combating violence against women and domestic violence is the first treaty in Europe establishing a comprehensive legal framework to protect women and girls against all forms of violence, and prevent, prosecute and eliminate violence against women, including domestic violence. The Convention places the elimination of violence against women within the wider context of achieving actual equality between women and men, thus recognising the violence against women as a form of discrimination. It expresses the determination of the Contracting States to also apply the general principles for the protection of human rights to women and girls who are victims of violence, as well as to the victims of domestic violence. This determination is based on the shared understanding of the member states of the aspirations of the Council of Europe to preserve and implement EU-wide principles and ideals.

The Preamble of the Convention states that the member States of the Council of Europe and the other signatories thereto aspire to create 'a Europe free from violence against women and domestic violence'. To this end, the Convention firmly establishes the link between achieving gender equality and the eradication of violence against women. Based on this premise, it recognises the 'structural nature' of violence against women and that it is a manifestation of the historically unequal power relations between men and women. The Convention consistently asserts that violence against women cannot be eliminated without investing in gender equality and that only actual (*de facto* and *de jure*) gender equality and change in attitudes can really prevent such violence.

Article 1 of the Convention sets out its purposes. Paragraph 1 states as the specific purpose of the Convention the protection of women against all forms of violence, as well as the prevention, prosecution and elimination of violence against women and domestic violence. In line with the recognition in the Preamble that there is a link between eradicating violence against women and achieving gender equality in law and in fact, it is specified that the Convention will contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men. This provision reflects the need for a comprehensive approach to the protection of and assistance to all victims of violence against women and domestic violence.

The stated purposes of the Convention fully conform to the fundamental constitutional principles of the Republic of Bulgaria. The Preamble of the Constitution highlights the loyalty of the Bulgarian people to the universal human values of which humanism, equality, justice and tolerance are specified explicitly. The rights of the individual and their dignity and security have been elevated to the rank of a supreme constitutional principle. Equality is among the fundamental principles of the current Bulgarian Constitution. There is an explicit constitutional prohibition on any discrimination on the grounds of 'sex' (Article 6(2) of the Constitution). Furthermore, the principle of equality in terms of dignity and rights is also proclaimed in the Basic Law as a fundamental human right. It is specified in a number of constitutional provisions and is embodied within the substance of individual fundamental rights and freedoms. The

current legislative framework is also a testimony to the aspirations of the Republic of Bulgaria to protect the fundamental human rights and, in particular, to protect all victims of violence, including women and children, as well as to eliminate all forms of discrimination and achieve equality: Criminal Code (promulgated in State Gazette No 26/02.04.1968; last amended in State Gazette No 55/03.07.2018), Protection against Domestic Violence Act (promulgated in State Gazette No 27/29.03.2005; last supplemented in State Gazette No 50/03.07.2015), Child Protection Act (promulgated in State Gazette No 48/13.06.2000; last amended in State Gazette No 17/23.02.2018), Gender Equality Act (promulgated in State Gazette No 33/26.04.2016), Protection against Discrimination Act (promulgated in State Gazette No 86/30.09.2003; last amended in State Gazette No 7/19.01.2018).

The Constitutional Court finds that despite its undeniable positive aspects, the Convention is internally contradictory and this contradiction creates duality therein. Thus, the meaning of some of its provisions goes beyond the Convention's stated purposes and its title.

In Article 1(1)(a) and (b) of the Convention the term 'women', which is undoubtedly based on the biological understanding of the sexes, is used to define the subject of protection against all forms of violence and discrimination. At the same time the legal definitions in Article 3(c) of the Convention (the English and French texts) include the term 'gender'/'genre', translated into Bulgarian as 'пол' ('sex'), with the following meaning: 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men'. The term 'gender' has been translated into Bulgarian as 'социален пол' ('social gender') only in the provision of Article 4(3) of the Convention. In the Convention the terms 'sex'/'sexe' and 'gender'/'genre' exist together, with 'gender' being included among the grounds of discrimination under Article 4(3) along with the biologically determined sex — 'sex, gender ...'/'sexe, genre ...'. Thus, gender as a biological category ('sex'), but also gender as a social construct ('gender') determined by the subjective perceptions and notions of the individual and of society about the role of men and women, are elevated to autonomous and equivalent categories of the Convention with their own legal existence. The term 'gender'/'genre' exists within the Convention as a separate category different from sex as a biological construct. The Convention divides the biological and social dimensions of gender and goes beyond the view of the gender binary of the human species. With the meaning specified in Article 3(c), 'gender'/'genre' becomes a fundamental term that also defines the meaning of other phrases used in the Convention and based on this term. The many provisions of the Convention, which contain phrases based on this term — Article 2(2), Article 4(3), Article 6, Article 14, Article 18, Article 49(2), Article 60(2) and Article 60(3) of the Convention — are also testimony to the autonomous role of the term 'gender'/'genre'. 'Gender' is used in the phrases: 'gender equality' (Preamble), 'gender-based violence' (Preamble, Articles 2, 3, 4, 14), 'gender identity' (Article 4(3)), 'gender-sensitive policies' (Article 6), 'gender perspective' (Article 6), 'non-stereotyped gender roles' (Article 14), 'gendered understanding of violence' (Article 18, Article 49(2)), 'gender-based asylum claims' (Article 60), 'gender-sensitive interpretation' (Article 60(2)), 'gender-sensitive reception procedures' (Article 60(3)). These phrases, depending on the interpretation, may lead to different and contradictory understandings of the philosophy of the Convention. The Convention is the first international treaty signed by the Republic of Bulgaria which gives such a definition of the term 'gender' (Article 3(c) of the Convention).

The provision of Article 4(3) of the Convention requires the Parties thereto to implement the provisions of the Convention, in particular measures to protect the rights of victims, '...without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social

origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status'. According to paragraph 53 of the Explanatory Report to the Convention, accompanying its creation, and in the light of the broad case-law of the European Court of Human Rights under Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the list under Article 4(3) has been significantly expanded as it seeks to provide protection against discrimination on multiple grounds to a number of vulnerable groups. According to the Report, this also includes persons that do not correspond to what society has established as belonging to 'male' or 'female' categories.

Although the Convention does not specifically regulate the rights of 'transgender' people, it is also the first international treaty signed by the Republic of Bulgaria which explicitly includes 'gender identity' in Article 4(3) as a ground of discrimination. It should be specified that the phrase 'gender identity'/'l'identité de genre' does not refer to 'gender' as a biological category, but rather to 'gender' in the meaning given in the definition of the term in Article 3(c) of the Convention. The Convention does not define 'gender identity'/'l'identité de genre'. The Explanatory Report to the Convention (paragraph 53) defines 'gender identity' as follows: 'Certain groups of individuals may also experience discrimination on the basis of their gender identity, which in simple terms means that the gender they identify with is not in conformity with the sex assigned to them at birth. This includes categories of individuals such as transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to "male" or "female" categories'.

Given the absence of a definition of the term 'gender identity' in the Convention, its meaning should be understood not only in view of the Explanatory Report, but also in the light of the policy of the Council of Europe on protecting certain rights of transgender persons. The abovementioned acts of the Council of Europe aimed against discrimination and violence on the basis of sexual orientation and gender identity clearly serve to clarify the meaning of the terms 'gender' and 'gender identity' in the context of the approach of the Council of Europe to promote the understanding that the biological and social dimensions of gender are not inextricably linked and exist independently of each other; the understanding of the ability of people to self-determine their gender; as well as to ensure full legal recognition by the State of the gender reassignment.

The analysis of the terms 'gender'/'genre', translated into Bulgarian, firstly as 'пол' ('sex') and secondly as 'социален пол' ('social gender'), and 'gender identity'/'l'identité de genre', translated into Bulgarian as 'идентичност, основана на пола' (sex-based identity) indicates that the terms are connected and should be understood through one another. The term 'gender'/'genre' with the meaning 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men' reflects certain social and cultural notions of men and women created within a given society at a given moment. These notions are evolving to the extent that newer notions can exclude the older ones, for example that gender is biologically determined. From this point of view, a biological man might have a female 'gender'/'genre' and vice versa. This leads to the possibility of the individual choosing, at their own will, a different 'gender identity' that might not coincide with the biological one. This understanding expresses aspects of the 'gender ideology' – a collection of ideas, convictions and beliefs that the biologically determined sexual characteristics are irrelevant, and only the gender self-identification is relevant.

The absence of a common understanding of the term 'gender'/'genre' is also illustrated by the active public and political debate 'for' and 'against' the gender ideology that has been ongoing for over two decades in dozens of countries.

As stated, the Convention uses two terms for gender — 'sex' and 'gender'. It introduces the phrase 'gender identity', which stems from the notion that the social dimension of gender is independent of the biological one. Any distancing from the term 'gender' as a biological attribute (man/woman) distances the Convention from the stated purposes of protecting women against all forms of violence. The internal contradiction in the Convention is obvious when comparing the purposes stated in Article 1 of the Convention and its title with the term 'gender' as defined in the Convention. Moreover, the very definition of the term 'gender' would have been redundant, if the stated purpose of the international treaty actually corresponded to its title '... on preventing and combating violence against women ...'. This duality of the terminology, of the meaning of the terms used, in practice does not lead to the achievement of gender equality, but rather blurs the differences between sexes thus resulting in the principle of equality losing its meaning.

The equality of the genders before the law is proclaimed at constitutional level in Article 6(2) of the Basic Law. Equality does not mean treating both sexes equally, but rather taking into consideration the biological traits and differences between them. Sex is among the grounds explicitly established in Article 6(2) of the Constitution, on the basis of which no privileges or limitations of rights are admissible (Judgment No 1 of 27 January 2005 under Constitutional Case No 8/2004). The constitutional text examines biological sex as a term with unambiguous legal meaning. This is confirmed both by the discussions on the provision as part of the draft Constitution '... for equality between a man and a woman' (Minutes of the Committee for Drafting a Project of a Bulgarian Constitution of 13 February 1991 and 10 June 1991) and by the case-law of the Constitutional Court on the interpretation of Article 6(2), where the criterion 'sex' is excluded from the group of attributes that are acquired or changed in the process of social realisation of the citizens in society (Judgment No 14 of 10 November 1992 under Constitutional Case No 14/92).

The Constitution and the entire Bulgarian legislation are built on the understanding of the gender binary of the human species. In fact, the Constitution clearly perceives the social dimension of gender in interaction with its biological determination – Article 47(2) of the Basic Law. In this constitutional provision, the biological sex 'woman' is linked to the social role 'mother' through 'birth' and 'obstetrical care'. In short, the term 'gender' is used by the constitutional legislator as a unity of biological determination and social construct. The social dimension of the Constitution does not create a social gender independent of the biological sex as provided for in the Convention.

At the level of international law, the understanding of gender as a unity of biological and social dimension is enshrined in the Rome Statute of the International Criminal Court (promulgated in State Gazette No 68/16.07.2002) Pursuant to the provision of Article 7(3) of the Rome Statute: 'For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.'

Traditionally, human society is built on gender binary, that is the existence of two opposite sexes, each being assigned specific biological and social functions and responsibilities. Biological sex is determined at birth and is in the foundation of the sex for the purposes of civil matters. The importance of the sex for

the purposes of civil matters in the legal regulation of social relations (cohabitation, parenthood) requires clarity, indisputability, stability and security.

The constitutional definition of matrimony, as it has always existed in the Bulgarian legal tradition, is contained in the provision of Article 46(1), which defines it as ‘...a voluntary union of a man and a woman’. The constitutional system of matrimony is built on the understanding of the existence of two biologically determined sexes – male and female. By defining matrimony as a voluntary union between a man and a woman the Constitution makes the different biological sex imperative for people who want to enter into marriage. The understanding of matrimony as a relationship between a man and a woman is deeply rooted in the Bulgarian legal consciousness, and is thus in the foundation of the constitutional system.

Contrary to this constitutional understanding of gender as a biological category, the term ‘gender’/‘genre’ as a social construct exists in the Convention individually and along with the term ‘sex’/‘sexe’. As stated above, this situation distances the scope of the Convention from the stated purposes of protecting women and opens up a room for its contradictory implementation, which is contrary to the rule of law in a formal sense (Article 4(1) of the Constitution).

The Convention paves the way for the introduction of the terms ‘gender’ and ‘gender identity’, as defined in Article 3(c), in the Bulgarian legal system. The requirements of Article 4(3) of the Convention would require the Republic of Bulgaria to establish procedures ensuring the legal recognition of genders other than the biological ones, which is contrary to the Constitution.

The rule of law exists in the case-law of the Constitutional Court with familiar and well-established meaning, which combines formal and material aspects. Today the European legal area widely shares the understanding of the rule of law, which includes both the principle of legal certainty — the formal aspect— and the principle of substantive justice — the substantive aspect (Judgment No 1 of 27 January 2005 under Constitutional case No 8/2004).

The rule of law in the formal sense (the state of legal certainty) requires the meaning of legal terms to be clear and unambiguous. The principle of legal certainty and predictability precludes the existence of two parallel and mutually exclusive terms for ‘gender’. The ratification of the Convention would lead to the introduction in the national legal system of a concept that is contrary to the one established in the Constitution.

The rule of law is the foundation of the established constitutional order. The proceedings under the first alternative of Article 149(1)(4) of the Basic Law ensure the implementation of the international community’s *acquis* in the national legal system while preserving the core values established by the Constitution.

The defining of ‘gender’ in the Convention as a social construct in fact blurs the lines between both sexes — man and woman as biologically determined. However, if society loses the ability to distinguish between a woman and a man, combating violence against women remains only a formal but unattainable commitment.

The Constitutional Court holds that the Convention, due to the provisions of Article 3(c) and Article 4(3) which are imperative to the meaning of the international treaty in its entirety, does not conform to the Constitution. It is precisely in respect of these provisions that the Convention does not allow any reservation. Under Article 78(1) of the international treaty: ‘No reservation may be made in respect of

any provision of this Convention, with the exceptions provided for in paragraphs 2 and 3'. The Constitutional Court emphasizes that, pursuant to Article 5(4) of the Basic Law, once this international treaty has been ratified, promulgated and enters into force for the Republic of Bulgaria, it will become a part of the domestic law of the country and will take precedence over any conflicting national legislation (Judgment No 7 of 2 July 1992 under Constitutional case No 6/1992).

Considering the above and on the grounds of the first alternative of Article 149(1)(4) of the Constitution, the Court

HEREBY RULES:

The Council of Europe Convention on preventing and combating violence against women and domestic violence, done on 11 May 2011 at Istanbul, signed by the Republic of Bulgaria on 21 April 2016, does not conform to the Constitution of the Republic of Bulgaria.

The judgment was rendered with eight votes.

Judges Rumen Nenkov, Georgi Angelov, Konstantin Penchev and Filip Dimitrov signed the judgment with dissenting opinion.

Chairperson: Boris Velchev